

MEMORANDUM signed 1/6/00

SUBJECT: Transmittal of Interim Final Guidance *Institutional Controls and Transfer of Real Property under CERCLA Section 120(h)(3)(A)(B) or (C)*

FROM: Office Director
Federal Facilities Restoration and Reuse Office

TO: Regional RCRA & Superfund Policy Managers, Regions I-X
Regional Counsels, Regions I-X

This memorandum transmits EPA's interim final guidance *Institutional Controls and Transfer of Real Property under CERCLA section 120(h)(3)(A)(B) or (C)*. The Federal Facilities Restoration and Reuse Office (FFRRO) developed this guidance to provide direction to EPA Regional Federal Facility programs on evaluating the effectiveness of institutional controls required to ensure protection of human health and the environment where there is the transfer of contaminated federal property under CERCLA section 120(h)(3). Separate guidance on this subject is needed because of the unique requirements placed on the Federal government for transfer of contaminated property to non-Federal parties (e.g., tribes, states, local governments, redevelopment authorities) under CERCLA section 120 (h). This policy does not apply to Federal-to-Federal property transfers, nor does it address whether an institutional control is an appropriate remedy or remedy component for a particular CERCLA site.

EPA understands that the reuse of federal property is important to affected communities and is supportive of its expeditious transfer. However, when EPA Regional Federal Facility Offices were surveyed by FFRRO, we found several cases at federal facilities where cleanup remedies have been damaged, failed, or sites were not secured to prevent exposure and/or endangerment of the public. Incidents reported included, but are not limited to, damaged or destroyed monitoring wells, landfill caps that had been breached, agricultural crops grown on contaminated land, inadequate posting, and potential exposures due to trespassing on ranges and other CERCLA sites.

In addition, over the last several years, there have been several studies by state and local government organizations pointing to the tenuous nature of institutional controls. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO), the National Association of Attorneys General (NAAG) and the International City/County Management Association (ICMA) have conducted analyses and reviews that underscore that there is uncertainty related to governmental roles and the enforcement and monitoring of institutional controls. The attached guidance is intended to fill the gap relative to transfer of contaminated federal properties under CERCLA section 120 (h) to non-Federal parties.

Given the Department of Defense's base closure program and the Department of Energy's leasing and decommissioning of surplus facilities, as well as other federal programs designed to

promote the re-use of federal properties, there is potential to transfer large numbers of Federal properties with residual hazardous substances/contamination left in place which require institutional controls to ensure protection of human health and the environment. The potential for the transfer of these contaminated federal properties highlights the need to ensure that institutional controls are clearly defined, roles are understood, and appropriate enforcement mechanisms are in place to ensure protection of human health and the environment.

This interim guidance provides criteria to EPA Regions to use in determining the effectiveness of institutional controls. It also outlines documentation requirements for EPA's evaluation of those institutional controls. The criteria and documentation requirements in this guidance should be used to evaluate whether a response action is "operating properly and successfully" or whether all remedial actions requiring institutional controls have been taken at a federal property to be transferred under CERCLA section 120(h)(3).

Earlier versions of this guidance were shared with EPA Regional programs and other federal agencies. The Department of Energy stated our guidance was "thoughtful and balanced" and was supportive of it. DOE further endorsed the guidance by summarizing and referencing it in their draft DOE guidance manual *EH Draft Guidance Manual, Selecting and Implementing Institutional Controls*. The Department of the Navy has issued a interim policy on institutional controls and the Air Force Base Conversion Agency is actively soliciting comments on its policy. EPA's Superfund Office will soon be issuing its final *Institutional Controls Handbook*.

The Department of Defense (DOD), raised concerns about our policy. While we have responded to some issues raised, others remain under discussion. DOD was most concerned about potential negative effects on property transfer. A second issue raised was that institutional controls are real estate mechanisms and that by issuing a policy on institutional controls, EPA was over-stepping its authority. Consistent with CERCLA and the Superfund National Contingency Plan, institutional controls are recognized an essential element to ensuring protection of human health and the environment, they are not merely "real estate transactions" (see 40 CFR Part 300.430). EPA believes that by following this guidance, institutional controls better defined, enforcement responsibilities will be clearer and various federal, state and local roles better understood. Removing these uncertainties should make property more attractive, not less so.

As there are several installations with controversies on the use of institutional controls relative to property transfer, we have decided to issue the guidance as interim final, while continuing to work these issues. Since this is an area where there is little experience, we are soliciting feedback on our interim final policy from EPA Regions, states, local redevelopment authorities, citizens around the facilities and the interested public.

Finally, EPA Regions are reminded that our oversight of all remedy selection and property transfer activities should be consistent with Executive Order 12898, which requires us as part of our mission to identify and address, as appropriate, disproportionately high and adverse impacts on minority and low-income populations. It is imperative that environmental justice concerns be considered early, rather than later in the process, when the property is to be transferred.

Development of this guidance has been greatly aided by the vigorous participation of Regional program and counsel staff, and by the Office of General Counsel. I appreciate the effort and input from both the EPA Regions and Headquarters. Comments on this guidance should be provided to Allison Abernathy, USEPA, Ariel Rios Building, Mail Code 5101, 1200 Pennsylvania Avenue, Washington, DC 20460 or by e-mail to abernathy.allison@epa.gov. Additionally, if you have questions about the implementation of this guidance or institutional control issues at DOD BRAC fast track facilities please contact Ms. Abernathy directly.

Attachment:

Institutional Controls and Transfer of Real Property under CERCLA Section 120(h)(3)(A), (B) or (C)

CONTENTS

| | | |
|-------------|---|---|
| 1.0 | Background of the Guidance | 1 |
| | What are institutional controls? | 1 |
| | What is the historical basis for this guidance? | 2 |
| | What is the statutory basis for this guidance? | 2 |
| 2.0 | Purpose and Scope of the Guidance | 2 |
| | What is the purpose of this guidance? | 2 |
| | What does the guidance <u>not</u> address? | 2 |
| 3.0 | Applicability of the Guidance | 3 |
| | Under what circumstances does the guidance apply? | 3 |
| 4.0 | General Guidelines for Institutional Controls | 3 |
| | Who is responsible for implementing institutional controls? | 3 |
| 5.0 | Specific Guidelines for Institutional Controls | 4 |
| | What information does EPA need? | 4 |
| 6.0 | Documentation of Institutional Controls | 5 |
| | What remedy selection documentation should EPA expect from the transferring federal agency? .. | 5 |
| | What if existing documents do not provide sufficient information on institutional controls? | 6 |
| 7.0 | “Operating Properly and Successfully Demonstrations” | 6 |
| | How does this guidance apply to demonstrations that remedial actions are “operating properly and successfully”? | 6 |
| | What documentation does EPA need to evaluate “operating properly and successfully demonstrations”? | 7 |
| | When should information for “operating properly and successfully” demonstrations be provided? | 7 |
| 8.0 | Coordination with State, Local, and Tribal Governments | 7 |
| | What organizations should be involved in the development of institutional controls? | 7 |
| 9.0 | Executive Order 13132, “Federalism” | 8 |
| | Does this guidance have Federalism implications? | 8 |
| 10.0 | Conclusion | 8 |
| | How will EPA evaluate institutional controls? | 8 |

Institutional Controls and Transfer of Real Property under CERCLA Section 120(h)(3)(A), (B) or (C)

Summary

This document provides guidance to the U.S. Environmental Protection Agency (EPA) on the exercise of EPA's discretion under CERCLA section 120(h)(3)(A), (B), or (C) when EPA is called upon to evaluate institutional controls as part of a remedial action. It also informs the public and the regulated community on how EPA intends to exercise its discretion in this context. This guidance is designed to implement the President's policy of promoting, encouraging, and facilitating the redevelopment and reuse of closing military bases while continuing to protect human health and the environment. EPA may change this guidance in the future, as appropriate.

EPA's evaluation of federal property transfers is contingent on the receipt of information establishing that the institutional controls will be effective in preventing human or environmental exposure to hazardous substances that remain on site above levels which allow unrestricted use. For this reason, this guidance requires that the transferring federal agency demonstrate prior to transfer that certain procedures are in place, or will be put in place, that will provide EPA with sufficient basis for determining that the institutional controls will perform as expected in the future. Such procedures, which are listed in Section 5.0 below, include the means for:

- **Monitoring** the institutional controls' effectiveness and integrity.
- **Reporting** the results of such monitoring, including notice of any violation or failure of the controls.
- **Enforcing** the institutional controls should such a violation or failure occur.

1.0 Background of the Guidance

What are institutional controls?

Institutional controls are nonengineering measures designed to prevent or limit exposure to hazardous substances left in place at a site, or assure effectiveness of the chosen remedy. Institutional controls are usually, but not always, legal controls, such as easements, restrictive covenants, and zoning ordinances.

What is the historical basis for this guidance?

The Department of Defense's (DoD) base closure program and the Department of Energy's reuse and reindustrialization of surplus facilities are just two examples of programs where federal properties with hazardous substances remaining on site are being transferred outside of federal control. These property transfers will often require the implementation of institutional controls to ensure that human health and the environment are protected. Such property transfers highlight the need to ensure that institutional controls are clearly defined, oversight and monitoring roles are understood, and appropriate enforcement mechanisms are in place to ensure that human health and the environment are protected.

What is the statutory basis for this guidance?

Section 120(h)(3)(A) of CERCLA requires that a federal agency transferring real property (hereafter, transferring federal agency ¹) to a nonfederal entity include a covenant in the deed of transfer warranting that all remedial action necessary to protect human health and the environment has been taken prior to the date of transfer with respect to any hazardous substances remaining on the property. In addition, CERCLA section 120(h)(3)(B) requires, under certain circumstances, that a federal agency demonstrate to the EPA Administrator that a remedy is "operating properly and successfully" before the federal agency can provide the "all remedial action has been taken" covenant. Under CERCLA section 120(h)(3)(C), the covenant can be deferred so that property may be transferred before all necessary remedial actions have been taken if regulators agree that the property is suitable for the intended use and the intended use is consistent with protection of human health and the environment.

2.0 Purpose and Scope of the Guidance

What is the purpose of this guidance?

This guidance establishes criteria for EPA to evaluate the effectiveness of institutional controls that are part of a remedy or are a sole remedy for property to be transferred subject to CERCLA section 120(h)(3)(A),(B), or (C). Accordingly, this institutional control guidance provides guidelines applicable to property transfers in general and, more specifically, to support "operating properly and successfully determinations" under CERCLA section 120(h)(3)(B).

This guidance does not substitute for EPA regulations, nor is it a regulation itself. Thus, it cannot impose legally binding requirements on EPA, states, or the regulated community, and may not apply to a particular situation based upon the circumstances.

What does the guidance not address?

¹By "transferring federal agency" EPA means the federal agency responsible for cleanup.

This guidance does not address the issue of whether an institutional control is appropriate for a particular site. That decision is made as part of the remedy selection process. If, however, it becomes clear that the criteria set forth in this guidance cannot be met, the scope, effectiveness, or even the use of an institutional control should be reconsidered. This guidance does not change EPA's preference for active and permanent remedies as stated in CERCLA section 121 ², or any of the requirements for selecting remedies in CERCLA or the NCP ³.

3.0 Applicability of the Guidance

Under what circumstances does the guidance apply?

The guidance applies in the following situations:

- When EPA approves “operating properly and successfully demonstrations” for ongoing remedies under CERCLA section 120(h)(3)(B). (See Section 7.0 for more information.)
- When EPA evaluates a federal agency's determination under 120(h)(3)(A) that all remedial actions have been taken, such as when commenting on a “finding of suitability of transfer,” in the consultative process established by DoD.
- When EPA approves a Covenant Deferral Request under 120 (h)(3)(C) ⁴ for an early transfer.

4.0 General Guidelines for Institutional Controls

Who is responsible for implementing institutional controls?

The decision to clean up a site to less than unrestricted use or to otherwise restrict the use of the site must be balanced by the assurance that a system will be in place to monitor and enforce any required institutional controls. This assurance is necessary to ensure the long term effectiveness and permanence of

²See also 55 *FR*, page 8706 (March 8, 1990).

³See CERCLA section 121 and 40 *CFR* 300.430.

⁴For more information, see *EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)*, June 16, 1998.

the remedy⁵. In EPA's view, the transferring federal agency is responsible for ensuring that the institutional controls are implemented. Even if implementation of the institutional controls is delegated in the transfer documents, the ultimate responsibility for monitoring, maintaining, and enforcing the institutional controls remains with the federal agency responsible for cleanup.

The transferring agency should clearly identify and define the institutional controls and set forth their purpose and method of implementation in a Record of Decision (ROD) or other decision document. Generally referring to or identifying an institutional control in a ROD is only one step in achieving the objective of an institutional control. An institutional control must be implemented in much the same way as an engineered remedy described in a ROD is designed and constructed.

5.0 Specific Guidelines for Institutional Controls

What information does EPA need?

EPA's review of federal property transfers requiring institutional controls should focus on whether the institutional controls, when in place, will be reliable and will remain in place after initiation of operation and maintenance. The information should document that the transferring federal agency will ensure that appropriate actions will be taken if a remedy is compromised. EPA should work with the transferring agency to obtain and evaluate the information described below as a precondition for EPA's support of federal property transfers under 120 (h)(3)(A),(B) or (C). At a minimum, EPA should expect to obtain the following information from the transferring federal agency:

- 1) A legal description of the real property or other geographical information sufficient to clearly identify the property where the institutional controls will be implemented.
- 2) A description of the anticipated future use(s) for the parcel.
- 3) Identification of the residual hazard or risk present on the parcel requiring the institutional control. In addition, the specific activities that are prohibited on the parcel should be identified, including prohibitions against certain land use activities that might affect the integrity of the remedy, such as well drilling and construction.
- 4) The specific institutional control language in substantially the same form as it will appear in the transfer document and a description of the legal authority for the implementation of these controls, such as state statutes, regulations, ordinances or other legal authority including case law.

⁵For more information, see 55 *FR* section 300.430 (e)(9) (iii)(C)(2).

- 5) A statement from the transferring federal agency that, in their best professional judgement, the institutional controls conform or will conform with the legal requirements of the applicable state and/or local jurisdiction. This statement should also explain how the institutional controls will be enforceable against future transferees and successors. Compliance with the institutional control should be enforceable against whoever might have ownership or control of the property. For Base Realignment and Closure properties, the majority of the transfers which EPA reviews, this statement could be included in a memorandum transmitting the final institutional control language for the deed of transfer from a DoD component attorney to the Commanding Officer. The memorandum could state that, based upon a review of the particular state's real estate laws, the component attorney believes that the institutional control is binding in perpetuity and enforceable in state court, and if it is not, he/she will revisit the institutional control or the entire remedy decision. This memorandum could be included in DoD's "operating properly and successfully demonstration" letter to EPA ⁶.
- 6) A description of who will be responsible for monitoring the integrity and effectiveness of the institutional controls and the frequency of monitoring. If this is a party other than the transferring federal agency, the transferring federal agency should provide documentation that the party accepts or will accept the responsibility. The transferring agency should also describe which specific party or office will be responsible for overseeing the institutional controls. The transferring agency might, for example, provide details of the types of assistance that other government agencies will provide in preventing the drilling of drinking water wells as well as the frequency of monitoring to ensure that drilling is not occurring.
- 7) A description of the procedure that will be used to report violations or failures of the institutional controls to the appropriate EPA and/or state regulator, local or tribal government, and the designated party or entity responsible for reporting.
- 8) A description of the procedure that will be used to enforce against violations of an institutional control, an identification of the party or parties that will be responsible for such enforcement, and a description of the legal authority for this enforcement procedure, such as state statutes, regulations, ordinances, or other legal authority including case law.
- 9) Assurance that the transferring federal agency will verify maintenance of the institutional control on a periodic basis unless other arrangements have been made. In the latter case, where another party is performing the monitoring function, that party should provide such assurances. In addition, the transferring federal agency must commit to verify the reports on a regular basis in this case.

⁶This is consistent with DoD's own requirement in their guidance *Responsibility for Additional Environmental Cleanup after Transfer of Real Property*, which states "The DoD component disposal agent will also ensure that appropriate institutional controls and other implementation and enforcement mechanisms, appropriate to the jurisdiction where the property is located, are either in place prior to the transfer or will be put in place by the transferee."

- 10) A description of the recording requirements in the jurisdiction where the site is located. The transferring agency also must describe the methods it will use to provide notice of the institutional controls at the site to subsequent owners or lessees.

6.0 Documentation of Institutional Controls

What remedy selection documentation should EPA expect from the transferring federal agency?

EPA may base its evaluation of the institutional control on information found in the following remedy selection, remedy design, or other documents:

- RODs that contain sufficient information regarding institutional controls.
- Other post-ROD documents that are completed following the selection of a remedy, such as a Remedial Design, Remedial Action Plan, or Operation and Maintenance Plan. This applies in cases where the ROD requires the use of an institutional control but fails to provide sufficient information regarding purpose, implementation, or enforcement (such as in older RODs).

What if existing documents do not provide sufficient information on institutional controls?

If none of the documents mentioned above provide sufficient detail on the implementation of the institutional control, the transferring federal agency should develop an “Institutional Control Implementation Plan” (ICIP) to assist EPA in evaluating the effectiveness of the institutional control. The ICIP should adhere to the following conditions:

- The ICIP should be a comprehensive strategy for the implementation of institutional controls.
- The ICIP should identify the parties responsible for implementing and monitoring the institutional controls.
- The ICIP should document that procedures adequate for effectively implementing and monitoring the institutional control are in place or will be put in place.
- The level of detail in the ICIP should be commensurate with the risk at the site. Depending on the residual risk posed by the site, for instance, EPA may require that the plan be agreed upon by both EPA and state regulators and/or that the plan be structured as an agreement among all the parties involved via a Memorandum of Agreement, amendment of a ROD or Federal Facilities Agreement, or an operation and maintenance plan.

7.0 “Operating Properly and Successfully Demonstrations”

How does this guidance apply to demonstrations that remedial actions are “operating properly and successfully”?

In August 1996, EPA issued guidance to EPA's Regional Federal Facility programs describing the approach EPA should use in evaluating a federal agency's demonstration that a remedial action is "operating properly and successfully" as a precondition to the deed transfer of federally-owned property, as required in CERCLA section 120(h)(3)(B). In that guidance, entitled *Guidance for Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully under CERCLA Section 120(h)(3)*, EPA directed Regional decision-makers to consider a number of factors in evaluating an "operating properly and successfully demonstration" of ongoing remedial actions, including institutional controls. With respect to institutional controls, EPA stated generally that:

"If the integrity of the remedial action depends on institutional controls (e.g., deed restrictions, well drilling prohibitions) these controls should be clearly identified and agreed upon."

Additionally, under the more specific criteria that must be demonstrated for groundwater remedies, the 1996 guidance included "appropriate institutional controls are in place" as a criterion, but did not describe how federal agencies should meet this requirement. For ongoing remedial actions involving institutional controls and for which EPA must evaluate a transferring federal agency's demonstration that a remedial action is operating properly and successfully, the information listed in Section 5.0 of this guidance should be submitted as part of the data requirements for the remedial action.

What documentation does EPA need to evaluate "operating properly and successfully demonstrations"?

The following documentation is needed for all "operating properly and successfully demonstrations":

- The transferring federal agency should research, assemble, and analyze the information to demonstrate to EPA that the remedy is operating properly and successfully.
- The cover letter forwarding the information to EPA should request EPA's approval of the demonstration and include a statement by a Commanding Officer or senior official similar to the following:

I certify that the information, data, and analysis provided are true and accurate based on a thorough review. To the best of my knowledge, the remedy is operating properly and successfully, in accordance with CERCLA 120(h)(3)(B).

Generally, where institutional controls are a component of a remedy, EPA should not consider "operating properly and successfully demonstrations" that are not consistent with the requirements described above in Sections 5.0 and 6.0.

When should information for "operating properly and successfully" demonstrations be provided?

EPA should encourage federal agencies preparing "operating properly and successfully demonstrations" to work closely with EPA in planning the scope and presentation of the documentation. A

minimum of 45 days is needed for EPA to review all “operating properly and successfully demonstrations.”

8.0 Coordination with State, Local, and Tribal Governments

What organizations should be involved in the development of institutional controls?

Successful management of institutional controls is critical to protecting the human health and environment of the communities where federal properties are located. For this reason, EPA encourages early communication and cooperation among federal, state, local, and tribal governments in the development of institutional controls and implementation plans. Where the viability of the institutional control is contingent on state property law or where state institutional control-related laws may apply (e.g., documentation of institutional controls in a state registry), it is particularly important to coordinate with the state. As a matter of policy, therefore, EPA will forward all institutional control information received for federal property transfers to the appropriate state, local, and tribal governments. EPA also will solicit comments from these organizations as appropriate.

9.0 Executive Order 13132, “Federalism”

Does this Guidance have Federalism Implications?

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations and regulatory policies that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

This guidance does not have federalism implications. This guidance aids EPA in implementing its responsibilities under CERCLA section 120(h)(3)(A), (B) or (C). This guidance also encourages Federal agencies to coordinate the development and implementation of institutional controls with state, local and tribal governments. Neither such coordination, nor any other aspect of this guidance, however, will have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of the Executive Order do not apply to this guidance.

10.0 Conclusion

How will EPA evaluate institutional controls?

EPA prefers to work with federal agencies early in the remedy selection process to assure full and consistent consideration of the long term effectiveness of the institutional controls. For this reason, it is imperative that these discussions begin prior to remedy selection. Although the federal government has had less experience designing and implementing institutional controls than engineered remedies, EPA will use its professional judgement in evaluating institutional control plans, as it does in evaluating other aspects of remedies and operations and maintenance. The basis for that judgment may vary depending on the site characteristics. EPA understands the importance of rapid reuse to the surrounding communities

and is committed to supporting this effort while maintaining the Agency's primary goal of protecting human health and the environment.